BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of: | ) | |
| | ) | |
| Application of | ) | |
| | ) | |
| KALW (FM)<br>San Francisco, CA | ) | File No. BRED-970801 YA |
| | ) | |
| | ) | |
| For Renewal of Its License as<br>a Noncommercial Educational Radio<br>Station | ) | |

To the Mass Media Bureau:

OPPOSITION TO PETITION TO DENY

Federal Communications Commission

Docket No. 97-191 Exhibit No. 4

Presented by SFUSD

Disposition: Identified 5/26/05; Received 5/26/05; Rejected

Reporter E Stadnik

Date 5/26/05

Respectfully submitted,

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Licensee of KALW(FM), San Francisco, CA.

Ernest T. Sanchez
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Dated: January 20, 1998

## SUMMARY

San Francisco Unified School District ("SFUSD"), the licensee of noncommercial educational broadcast station KALW(FM), files an Opposition to the Petition to Deny which was filed on November 3, 1997 by Golden Gate Public Radio ("GGPR"). SFUSD submits that GGPR's Petition should be dismissed on a number of substantive, procedural, and policy grounds.

SFUSD's first basis for dismissal is that GGPR violates several requirements of section 309(d) of the Communications Act and the rules of the Commission which govern pleadings in general and petitions to deny in particular. Specifically, SFUSD shows that the petition is untimely because the filing was not complete until over one month after the deadline for such pleadings. GGPR failed to serve SFUSD at the time of its filing and only did so more than one month later. Also, GGPR has not alleged or supported any claim to status as a party in interest and, thus, lacks standing. Neither has GGPR provided verification of its *pro se* pleading, or affidavits or declarations of a person with personal knowledge of facts alleged.

SFUSD also urges dismissal of the petition because a number of the documents attached to it as exhibits appear to have been acquired in violation of federal or state law. SFUSD indicates the statutory provisions that may have been violated as well as those which indicate an underlying federal policy of inadmissibility for documents acquired in violation of certain federal criminal statutes that may be applicable here.

GGPR, as SFUSD next argues, bases much of its petition upon a private employer/employee dispute concerning the interpretation and implementation of civil service rules, matters which are not properly a matter for Commission adjudication.

With respect to the substantive aspects of petition, SFUSD demonstrates that GGPR has failed to raise any substantive or material question with respect to SFUSD's fitness as a licensee and thus has not met the burden of proof placed upon petitioner's to deny by section 309 (a) and (k) of the Communications Act. GGPR's arguments are either irrelevant because they are not probative of any question of violation, or constitute inadmissible hearsay, or both. Furthermore, the affidavits and exhibits filed by SFUSD completely refute any implication that GGPR sought to raise against its fitness by showing that the GGPR's claims are not true or are phrased in such a stilted subjective manner as to make them irrelevant.

Finally, SFUSD brings to the Commission's attention the fact that GGPR had, before filing this petition, threatened to do so unless SFUSD transferred control over KALW's operation and management to GGPR which, it would appear, is the type of abuse that the Commission sought to rectify by its amendment of Rule 73.3589.

SFUSD concludes by respectfully requesting the Commission to grant it an unconditional renewal of its license because it is in full compliance with section 309 (a) and (k) of the Communications Act.

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To the Mass Media Bureau:

OPPOSITION TO PETITION TO DENY

The San Francisco Unified School District (hereafter, "SFUSD" or the "Board of Education") is a political subdivision of the State of California and the licensee of KALW (FM), a noncommercial educational radio station. SFUSD, through its attorneys, files this Opposition to the Petition to Deny filed by Golden Gate Public Radio (hereafter, "GGPR") on November 3, 1997.[1]

[1] As discussed in more detail in Section I.B. of this Opposition and the Declaration of Ernest T. Sanchez, the Petition to Deny contained no Certificate of Service and was not, in fact, served upon SFUSD or its counsel until after the Mass Media Bureau brought this lapse to the attention of Golden Gate Public Radio ("GGPR") and of counsel for SFUSD. Service was ultimately made upon counsel for SFUSD by Federal Express on December 10, 1997, received the next day, December 11, 1997. By agreement between the directors of GGPR, which is acting *pro se* in this proceeding, and counsel for SFUSD, an extension of time to file this Opposition was granted to and including January 20, 1998. This agreement also permits GGPR until February 19, 1998 to file any Reply, if it so chooses.

For the reasons stated herein, SFUSD respectfully requests that GGPR's Petition to Deny be stricken in its entirety and dismissed. The pleading should be dismissed because it is untimely, because GGPR lacks standing, and because the petition does not comply with the requirements of Section 309(d)(1) of the Communications Act of 1934, as amended, and is replete with numerous other substantive and procedural deficiencies. Furthermore, even if any or all of these reasons might otherwise cause it to be treated as an informal objection, GGPR's pleading should nevertheless be dismissed in its entirety and receive no substantive consideration because it contains documents that appear to have been illegally and improperly obtained; because the matters raised in the pleading are primarily concerned with a private contractual dispute; because the allegations raised therein are not supported by an affidavit or declaration made with personal knowledge; and because, a consideration of the petition on the merits reveals that it fails to raise any substantive or material question of fact regarding SFUSD's fitness as a licensee.

SFUSD's application for renewal meets the standards set forth in subsections 309 (a) and (k) of the Communications Act, as amended, and should therefore be renewed.

## I. THE PETITION SHOULD BE DISMISSED BECAUSE GOLDEN GATE PUBLIC RADIO HAS NOT COMPLIED WITH ANY OF THE REQUIREMENTS OF SECTION 309(d) OF THE COMMUNICATIONS ACT OR THE RULES GOVERNING SUCH PLEADINGS.

GGPR and its "directors", Jason Lopez and Deirdre Kennedy, have ignored the procedural and substantive requirements of Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. § 309(d)(1). That statute requires that petitions to deny establish by specific allegations of fact that the petitioner has standing and that a grant of the

application would be prima facie inconsistent with subsection (a) or (k) of the statute. Subsection (d)(1) also requires that these specific allegations of fact must be supported by an affidavit of a person or persons with personal knowledge thereof. GGPR has not complied with any of these requirements or with Rule 73.3584, 47 C.F.R. § 73.3584.

A. The Petition is Untimely.

Rule 73.3584 (a) provides that, with respect to applications for renewal of a license, petitions to deny may be filed at any time up to the deadline established in Rule 73.3516(e). This latter rule provides that a petition to deny an application for license renewal will be considered timely if it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term. The current license of KALW(FM) was due to expire on December 1, 1997, which makes November 1997 the "last full calendar month" of that term. Thus, GGPR's petition should have been "tendered for filing" on or before November 1. Since this was a Saturday, November 3 would have been the last date. The Petition to Deny that GGPR initially filed, without any certificate of service and without service on SFUSD, was date-stamped November 3, 1997. Because this Petition had not, however, as of the date of filing, been served upon SFUSD or its counsel (see, Declaration of Ernest T. Sanchez, *passim.*), it did not meet the requirements of section 309(d) or the Commission's rules regarding petitions to deny and service (see Section I.B.2 below, which explores the lack-of-service issue) as of the filing deadline for filing and was incomplete on November 3, 1997. Rule 73.3584 (e) provides that

(e) Untimely Petitions to Deny, as well as other pleadings in the nature of a Petitions to Deny, and any other pleadings which do not lie as a matter of law or are otherwise procedurally defective, are subject to return by the FCC's staff without consideration.

SFUSD submits that to be returned without consideration is the appropriate treatment for GGPR's petition due not only to its untimeliness and incompleteness (and certainly the untimeliness of the exhibits and affidavits, which were not provided in any form to SFUSD until December 11, 1997, according to Mr. Sanchez' Declaration) but also its many other procedural defects.

**B. GGPR Lacks Standing to File a Petition to Deny.**

The purported "Petition to Deny" contains no specific allegations of fact that would qualify GGPR as a "party in interest" under § 309(d)(1). GGPR has completely failed to allege its standing, any basis for standing, or any facts that would support a claim to standing. The only factual allegations GGPR has made about itself is its unverified and unsupported claim that it is a "California public benefit corporation, located in San Francisco, California." This allegation is utterly insufficient as a basis for GGPR to maintain a claim to standing. Furthermore, Jason Lopez and Deirdre Kennedy, the signatories of the petition, also lack standing because no factual allegations whatsoever are made regarding whether either of them are qualified as parties in interest, a status they do not even claim for themselves or GGPR.

The statute also specifically requires that the petitioner must supply an affidavit or declaration of "a person or persons with personal knowledge" of the facts that are alleged in support of the petitioner's claim to be a party in interest. See, *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*UCC*

*v. F.C.C.*"); *In re Application of Infinity Broadcasting Corp. of California*, 10 FCC Rcd 9504 (1995) ("*Infinity Broadcasting*"). Given the pleading's lack of any factual allegations whatsoever to support standing, GGPR's further failure to file the required affidavit or declaration is hardly surprising. One may comb the entire pleading and its attachments in vain without finding an affidavit or declaration that would make or support a claim that GGPR or either of its directors is a party in interest.

Furthermore, when a petition is filed by a group (as GGPR appears to be), the group must "provide the affidavit of one or more individuals entitled to standing indicating that the group represents local residents and that the petition is filed on their behalf" or some other recognized basis for standing. *UCC v. F.C.C.*, 359 F.2d at ___ ___; Infinity Broadcasting, id., citing *Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 99 (1980) ( hereafter "*Standing Rule Making*"). Neither Lopez nor Kennedy provided an affidavit or declaration which would meet the requirements for GGPR standing under that *UCC* test.[2] While the purported petition contains three executed affidavits (by individuals other than Lopez or Kennedy), none of these affidavits deals with any claim to or basis for GGPR's standing. For these reasons, neither GGPR, Lopez, nor Kennedy can be accorded standing for purposes of filing a petition to deny.

### C. GGPR Has Not Met Either the Requirements of § 309(d) Regarding Either Service or Affidavits.

[2] Exhibit Y to the Petition purports to be an affidavit of Jason Lopez. This document does not attest to either Mr. Lopez' or GGPR's standing but, rather, is limited to a single specific allegation going to a single allegation against SFUSD. Furthermore, this exhibit would not qualify as either an affidavit or a declaration under Rule 1.16, because of defects in its form (see Section 1.D. below). Ms. Kennedy has not provided an affidavit, declaration, or signed statement of any kind.

1. Lack of Affidavits or Declarations. Failure to allege or support any basis for standing is only the first of many defects in GGPR's pleading. GGPR has also failed to provide, or support through affidavits or declarations of a person with personal knowledge, specific factual allegations sufficient to show that a grant of the application would be contrary to the public interest. The petition and affidavits/statements consists primarily of vague, conclusory, and unsupported hearsay allegations, which reveal that GGPR's major underlying concern is the disagreement of a few KALW employees with the way in which management has implemented civil service policies. No affidavit or declaration is provided to support those allegations. Failure to provide an affidavit or declaration attesting to the facts alleged in a petition to deny is grounds for dismissal of the petition. *Infinity Broadcasting Corp., id.*, at 9505. As explained in *Wometco Enterprises, Inc.*, 55 R.R. 2d 1545, 1552 (1984),

> [n]ot only does the Section [309(d)] require the petition to contain specific allegations of fact showing that grant of the application would be, on its face, inconsistent with the public interest but it also requires that the petition be supported by an affidavit of a person with personal knowledge of the facts alleged.

*Accord, Stone v. F.C.C.*, 466 F.2d 316, 322 (D.C. Cir. 1972), reh. denied, 466 F.2d 331 (D.C. Cir. 1972).

GGPR attached three affidavits (Exhibits B, C, and D), none of which provided sufficient support for the allegations of fact made in the petition that could prima facie show any material or substantive matter relating to SFUSD's fitness as a licensee. The factual allegations in these affidavits deal with nothing other than the affiants' limited subjective perceptions.

Four other purported "affidavits" (Exhibits F, H, I, and Y) are attached to the petition. These cannot be considered affidavits because they contain no notarization; neither are they declarations, the substitute permitted by Rule 1.16, because they do not contain the proper attestation required by the rule ("I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct"). These purported "affidavits" are, therefore, no more than unsupported hearsay and will be referred to as "statements" hereafter in this Opposition.[3]

2. Lack of Service. As explained in Section I.A., above, GGPR violated the requirements of section 309(d), as well as Rule 1.47 of the Commission's Rules, by its failure to serve a copy of the pleading upon KALW or its counsel. The statute requires that the petitioner must serve a copy of the petition upon the applicant. As the Declaration of Ernest T. Sanchez attests, the original pleading which appears to have been signed on October 31, 1997 and received by the Commission on November 3, was not served on SFUSD until December 11 (Sanchez Declaration, ¶¶ 4 - 7).

As filed with the Commission on that date, the petition did not contain a certificate of service (Exhibit 3, Sanchez Declaration). Only after the EEO Branch of the Mass Media Bureau contacted Mr. Lopez and Ms. Kennedy was SFUSD/KALW's

[3] SFUSD's argument that these statements do not qualify as either affidavits or declarations is not simply a matter of technicalities or procedural niceties. The Commission permits parties and witnesses to provide either affidavits or declarations to support factual allegations they wish to make. The option of providing a declaration, and thus avoiding the need for a notary, presupposes some means that will allow the Commission to enforce the perjury element of Rule 1.16 where no notarized swearing to factual allegations has occurred. As a federal agency, the Commission must look to the rules of evidence and perjury of the United States. It cannot enforce the perjury rules of the State of California. These four statements, Exhibits F, H, I, and Y, are fatally defective not because SFUSD is nit-picking but because the allegations contained therein are attested to only under state law standards, which the Commission is powerless to enforce. These exhibits are, therefore, merely hearsay statements, lacking any inherent reliability, and without force to meet the standards of section 309(d)(1).

counsel finally served with a complete copy of the pleading with all exhibits.[4]

GGPR violated Rule 1.47 of the Commission's Rules, as well as Section 309(d)(1) of the Act, because Kennedy and Lopez, who signed the petition (and, presumably, transmitted the petition for filing), had the responsibility on or before October 31 or November 3, 1997, to have first made service upon SFUSD or its counsel. The rule requires service must be made "on or before the day on which the document is filed." They did not do so. Their belated service on SFUSD's counsel, over one month later (Sanchez Declaration, ¶ 7) does not cure that initial violation of the rules and statute, a violation that SFUSD has not waived. As pointed out in footnote 4, under Rule 1.47(g) the Commission's staff may only permit a party to amend or supply a missing proof of service; they cannot cure, waive, or forgive lack of service itself.

D. GGPR's Pleading Was Not Verified in Accordance with Rule 1.52.

Rule 1.52 requires a party which is not represented by counsel to sign and verify the pleading and state his address. Ms. Kennedy and Mr. Lopez apparently did sign the original pleading, but it contains no verification and neither of them provided an address for themselves or for the corporation. The significance of the signed verification by a

[4] According to a November 12, 1997 note from Mr. Lopez to Mr. Sanchez from Mr. Lopez (Exhibit 2, Sanchez Declaration), GGPR claimed it was unable to serve SFUSD with the pleading in its entirety because an accident had befallen Dave Evans who, Mr. Lopez claimed, had possession of GGPR's copy of the pleading and exhibits. While the accident is most unfortunate, it apparently did not occur until sometime after Lopez and Kennedy had signed the pleading and they or some other person had transmitted it to the Commission for filing. Thus, at the time of filing, GGPR had not, in fact, even attempted to serve SFUSD or its counsel as it is required to do by section 309(d)(1) and the Commission's rules. As pointed out above, Rule 1.47 requires that service must be made by the person filing or his representative "on or before the day on which the document is filed." The failure of GGPR, Lopez, and Kennedy to effectuate service upon SFUSD at the required time is not excused by subsequent events. Amendment or belated supply of a certificate of service may be permitted, but no Commission rule permits waiver or forgiveness of a party's failure to comply with the statutory requirement of service itself.

*pro se* party is akin to that of an attorney's signature -- it "constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." 47 C.F.R. § 1.52. The rule is similar in purpose and effect to Rule 11 of the Federal Rules of Civil Procedure in federal court litigation. Also like Rule 11, sanctions may be imposed upon an attorney or party, including striking the pleading "as sham or false" if it is not filed in accordance with the requirements of Rule 1.52.

SFUSD urges that the pleading filed by GGPR should be stricken and dismissed for failure to comply with this requirement, which is far more than a mere procedural nicety. Rather, rules like this one and Rule 11 protect the integrity of an agency's or court's processes, assuring that those who choose to invoke its jurisdiction have done so in good faith, mindful of the seriousness of what they are doing and the charges they are making. If a licensee is to be called upon to incur the burdens entailed in defending its license renewal, then fairness and due process demand that those who act *pro se* when they seek nonrenewal should be held to the same standards of veracity as attorneys who practice before the Commission.

E. **Documentary Exhibits Attached to GGPR's Pleading Are Unsupported and Inadmissible Hearsay and Must Be Stricken or Disregarded in Accordance with § 309(d) of the Act and the Commission' Rules.**

Twenty-nine exhibits are attached to GGPR's pleading. Of these, at least twenty (G, J, I, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Z, AA, and BB) are not supported by an affidavit or declaration of a person with personal knowledge of the facts alleged therein. The documents are simply dropped on the record. No affidavit references,

alludes to, or vouches in any way for their authenticity.

Each of these documents should therefore be stricken as a violation of the requirements of section 309(d) of the Communications Act, which requires that all allegations of fact must be supported by an affidavit of a person with personal knowledge thereof.

GGPR actually cites section 309(d)(1) -- and even quotes it in part (GGPR Petition, p. 16). Presumably, therefore, Lopez or Kennedy actually read the text of the statute. It is quite remarkable, therefore, how many procedural and pleading requirements of this section they ignored. This petition flouts one procedural requirement after another: no service was made; no verification is provided; no claim or proof of standing is advanced; no affidavit or declaration of a person with personal knowledge of the charges alleged is provided. Furthermore, even if one were to piece together the factual claims in the individual affidavits (which would not meet the requirements of either statute or rule), one would not find enough support to meet these requirements. This remains the case even if one were to bring in the inadmissible hearsay declarations. As such, under the Commission's rules and precedents, this pleading should be dismissed and, if considered at all, could only be treated as no more than an informal complaint. *Wometco Enterprises, id.* Even *pro se* parties are held to the Commission's standards. Would-be petitioners who choose not to seek legal representation are as fully subject to dismissal for failure to comply with section 309(d)(1). *Infinity Broadcasting Corp.*, at 9504. GGPR's pleading should be summarily stricken and dismissed.

## II. GGPR'S PLEADING SHOULD BE STRICKEN BECAUSE IT INCLUDES DOCUMENTS THAT APPEAR TO HAVE BEEN ACQUIRED IN VIOLATION OF FEDERAL AND STATE CRIMINAL LAWS.

In their apparent zeal to attack the licensee and management of KALW(FM), GGPR and its principals have stepped over the boundaries of legal, legitimate, and ethical behavior. A number of the exhibits attached to GGPR's pleading appear to be copies of documents which neither Lopez nor Kennedy had any legal right to possess. According to the declarations of Jeffrey Ramirez (KALW's General Manager), Enrique E. Palacios (SFUSD's special liaison between the Board of Education and the radio station), Ana C. Perez and William Helgeson (two KALW employees), and Michael Moon (an individual who was being recruited for employment at KALW), the stolen documents appear to fall into three categories: an illegally-intercepted or -accessed e-mail message; confidential and private personnel records; and miscellaneous documents that are the property of SFUSD and appear to have been taken from the files of SFUSD/KALW employees. At a minimum, GGPR should be sanctioned by having such exhibits stricken as sham, false, and scandalous, but a more appropriate sanction would be to strike and dismiss the entire pleading, without even permitting substantive consideration as an informal complaint.

### A. GGPR Has Acquired and Filed, as Exhibit S, an Illegally-Obtained E-Mail Message in Apparent Violation of the Federal Anti-Wiretapping Law.

Between the dates of July 30 and August 1, 1997, Jeffrey Ramirez, the General Manager of KALW, and Michael Moon, an individual whom Mr. Ramirez sought to recruit for a job at KALW, exchanged electronic mail ("e-mail") messages via their computers (Ramirez Declaration, ¶ 6; Moon Declaration, ¶¶ 2, 3). Mr. Ramirez and

Mr. Moon each fully expected this communication to be, and to remain, private. Each utilized a password; neither printed out a hard copy of the e-mail message or shared it with any other person. Yet, Mr. Lopez or Ms. Kennedy somehow obtained a printed copy of that message, which was partially redacted and then attached to GGPR's pleading as Exhibit S.[5]

Section 2511 of the federal criminal code prohibits the interception of "any wire, oral, or electronic communication", 18 U.S.C. § 2511, as amended; while section 2701 of that title prohibits intentional unauthorized access of "a facility through which an electronic communication service is provided." Each offense is considered a criminal act, punishable by fine or imprisonment. As stated in their declarations, neither Mr. Ramirez nor Mr. Moon knows how this e-mail message was obtained by GGPR, whether it was intercepted at the time of initial transmission or whether it was later illegally accessed from a computer hard drive. Until an internal investigation is completed, neither SFUSD, nor the two actual victims of this unauthorized interception/access, can determine exactly how this document fell into the hands of GGPR. SFUSD is, however, outraged at this breach of the security of its computer and e-mail systems and invasion of the privacy of its employee. SFUSD is further outraged that a document that was apparently illegally obtained can show up in a pleading filed with a federal government agency.

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[5] As an aside, SFUSD wonders why GGPR considers this document significant enough to have obtained it by whatever clandestine means were used or to attach it to this pleading. GGPR apparently seeks to use it to make the irrelevant point that Mr. "Ramirez was . . . aware of Civil Service procedures" (GGPR Petition, at 14). GGPR members' concern over SFUSD's implementation of civil service rules, as discussed below in Section III, appears to lie at the heart of the private dispute that forms the real basis for this filing.

No Commission cases appear to deal with illegally-acquired e-mail that is proferred as evidence. However, section 605 of the Communications Act and the Federal Rules of Evidence recognize and require the mandatory exclusion of evidence that is in violation of this federal statute. As the Advisory Committee Notes to Rule 402, F.R.E. state, evidence is inadmissible if its acquisition would be prohibited by federal statute and specifically included 47 U.S.C. § 605 (1997) for this proposition. Section 605 of the Act prohibits the unauthorized interception or receipt of radio or wire transmissions and provides for civil remedies, including damages and injunctive relief, against those who violate its provisions.

The statute and its underlying policy make it clear, particularly when read in conjunction with the Anti-Wiretap Act provisions (which is also cited in section 605) and Rule 402 of the Federal Rules of Evidence), that Exhibit S must be stricken. Moreover, by logical extension of that policy, violators of this section of the Communications Act lack clean hands to appear before this agency .

Many Commission opinions and policy statements deal with abuse of process. While these have tended to focus on other types of abuse than that presented here, SFUSD believes that the underlying policies speak to the appropriate result. The Commission has, for example, adopted a formulation on the issue of settlements following extortionate threats which would not be inappropriate for a just resolution in the context of "evidence" of dubious or illicit origin:

> "Invocation of the petitioning process for reasons primarily unrelated to the merits of a licensee's application is highly improper and constitutes an abuse of process. . . . When substantial and material questions are raised as to a petitioner's conduct in filing and prosecuting a petition to deny, the Commission

will not hesitate to take appropriate and immediate action."
*Standing Rule Making*, 82 F.C.C. 2d 89, 103 (1980).

Parties must come before the Commission with clean hands. Credible evidence provided by SFUSD representatives effectively eliminates the possibility that this document was acquired through any legitimate means. It is difficult to imagine how GGPR could have come into possession of Exhibit S unless it had been acquired through unauthorized interception or unauthorized access. For the Commission to permit GGPR to continue to prosecute this pleading, in light of such presumptive evidence of unauthorized acquisition, would reward GGPR for possibly unlawful conduct, whether as a principal or as n accessory after the fact. In either case, the appropriate action by the Commission would be to strike and dismiss the petition as an abuse of process.

B. **GGPR Has Acquired, and Filed as Exhibits, a Number of Documents Which Appear to Have Been Unlawfully Removed from SFUSD/KALW Files Without Authorization.**

Exhibit M and Exhibit N are, according to the SFUSD Declarations, copies of documents taken from SFUSD personnel files. The removal and copying of these documents constitutes an invasion of Ms. Perez' and Mr. Helgeson's privacy and a breach of the security of SFUSD's personnel files.

Exhibits K, W and AA appear to be copies of documents taken from either the files or computer hard disk of Mr. Palacios, his staff assistant, or Mr. Helgeson. In each case, the removal and copying of these documents constitutes a breach of the security of SFUSD's business files. Mr. Lopez and Ms. Kennedy do not tell us how they came into possession of these personnel and business files but, according to their supervisors, they

had no right of access to these documents.

Section 504 of the California Penal Code reads as follows:

> Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust, or secrete it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

Cal.Pen.Code § 504 (1996).

Section 496 of that Code prohibits receipt of stolen property and creates an affirmative duty to make reasonable inquiry regarding property that comes into one's possession. Cal. Pen. Code § 496 (1996).

SFUSD does not ask or expect the Commission to adjudicatio or determine whether GGPR's possession of these documents is evidence of federal or state criminal offenses. The Commission is not well-suited for such a determination. The declarations of SFUSD's managers and employees strongly indicate that none of these documents could have been obtained by legitimate means, which raises the presumption that the documents were improperly and, perhaps, illegally obtained.

The Commission cannot wish its processes to be tainted by the receipt of "evidence" of dubious derivation. Unless GGPR can overcome the somewhat *res ipsa loquitur* presumption created by possession of these copies, the Commission should refuse to consider its pleading on any basis, even as an informal objection.

## III. THE "PETITION" REPRESENTS AN ATTEMPT TO ESCALATE A PRIVATE CONTRACTUAL AND LABOR DISPUTE RATHER THAN VINDICATE OR PROTECT THE PUBLIC INTEREST

The D.C. Circuit, in *UCC v. F.C.C.*, explained that its apparent broadening of Commission standing requirements had definite limitations. "It is important to remember," the majority wrote,

> that the cases allowing standing to those falling within either of the two established categories have emphasized that standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest.
>
> The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. . . . [P]rived litigants have standing only as representatives of the public interest.

359 F.2d at 1001.[6]

GGPR's principals have not filed their pleading to vindicate or protect the public interest but, rather, to embroil the Commission in a labor/management dispute between SFUSD and a small number of disgruntled employees. GGPR seeks to make a case against SFUSD that would more properly belong -- if anywhere -- before a union grievance board. Nearly one-half of the petition's 23 pages (Petition, pp. 8 - 12, 14, 19 - 22) are primarily concerned with whether KALW's managers and SFUSD complied with state civil service hiring preferences. GGPR repeatedly attempts to confuse such civil service matters with the Commission's EEO program guidelines. Many of the hearsay statements and documents attached as exhibits to the pleading also seem primarily concerned with union or civil service issues (see, *e.g.*, Exhibits F, H, L, M, N, P, Q, S, T, U, V, W, X, Z, and AA). These allegations and exhibits are simply not probative of the

[6] The D.C. circuit cited *FCC v. Sanders Radio Station*, 309 U.S. 470, 477 (1940), a case that concerned rights of appeal under 47 U.S.C. § 402(b), but concluded its analysis by noting the commonalities and similar effects of this section and § 309(d).

existence or implementation of an SFUSD EEO program but, rather, are limited entirely to narrow, arcane, and subjective claims with respect to the interpretation and implementation of California's civil service regulations, which are hardly synonymous with equal employment opportunity.

It is well-settled that the Commission "is not the proper forum for resolution of private contractual disputes and that any redress of such issues should be sought in a local court of competent jurisdiction." *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622, 8624 (1992), citing *John L. Runner, Receiver,* 36 R.R.2d 77, 778 (1976); *Trans-Continent Television Corp.*, 21 RR 945, 956 (1961) ("Commission has neither the authority nor the machinery to adjudicate" such matters); *WRQI(FM)*, 9 FCC Rcd 6873, 6881 (1994).[7] In the *WQYI* decision, the Commission specifically pointed out, citing *Operator Services Providers of America,* 6 FCC Rcd 4475, 4477 1991), that "Section 414 of the [Communications] Act preserves the availability . . . of such preexisting state remedies as tort, breach of contract negligence, fraud, and misrepresentation."

Here, GGPR allegations regarding SFUSD's implementation of civil service regulations is precisely the type of private contractual dispute in which the Commission has consistently declined to involve itself. Like many another would-be petitioner, GGPR has attempted to cloak these private issues in public-interest trappings by invoking that the State of California's civil service system as if it were the functional equivalent of the Commission's EEO program guidelines which, of course, it is not. The

[7] *Accord, Bryant, Owens and Cook-Owens (Bryant Communications, Inc.*, 6 FCC Rcd 6121 (1991); *Great Alaska Electric Radio Co., Inc.*,, 5 FCC Rcd. 2935 (1990) (denying an informal objection); *Word of Life Ministries, Inc.*, 2 FCC Rcd 2166 (1987).

Commission is not the forum in which to adjudicate the grievance of a union shop steward or the claim of a temporary employee to a full-time on-air announcer's job through a written civil-service test. These matters do not belong before Federal Communications Commission and the petition should, therefore, be dismissed. Even if it were treated as an informal objection, the issues raised remain merely a private dispute not cognizable by the Commission and should also therefore be dismissed.

## IV. GGPR'S "PETITION" SHOULD BE DISMISSED BECAUSE IT FAILS TO RAISE ANY SIGNIFICANT OR MATERIAL QUESTIONS REGARDING SFUSD'S FITNESS AS A LICENSEE TO SERVE THE PUBLIC INTEREST

The substantive standards for granting renewal of a broadcast license are set forth in subsections (a) and (k) of section 309 of the Communications Act, 47 U.S.C. § 309 (a), (k), as amended (1997). Subsection (a) Sets forth the basic "public interest, convenience, and necessity" standard to which all applications are subjected, while subsection (k) is specific to broadcast license renewals. The standards under subsection (k) are as follows:

> (1) Standards for Renewal. If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--
>
> (A) the station has served the public interest, convenience, and necessity;
>
> (B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and
>
> (C) there have been no other violations by the licensee of this Act or the rules and regulations which, taken together, would constitute a pattern of abuse.

Should the Commission, despite the many and cogent reasons set forth in Sections I, II, and III of this Opposition, nevertheless proceed to consider the substance of GGPR's pleading, either as a petition to deny or an informal objection, SFUSD

should nevertheless prevail on the merits. The factual allegations and legal arguments that GGPR attempts to raise against SFUSD and KALW fall completely short of what is required under section 309(d) and, whether petition or informal objection, GGPR's pleading should be denied in its entirety.

**A. As a Matter of Fact and Law, SFUSD Is Qualified Under Section 309 for Renewal of Its License.**

SFUSD has fully met the standards of subsections (a) and (k). As the Commission is aware, no complaints have been filed against the station or licensee during the past license term and no question of violation of the Communications Act or the rules and regulations has been raised during this period. In accordance with § 309, SFUSD's application for renewal of its license should be granted.

For any petitioner to succeed in blocking SFUSD's renewal, it would have to establish that granting its application would be prima facie inconsistent with the above-quoted standard. Section 309(d)(2) sets forth the burden of proof that a petitioner must meet: it must show that "substantial and material" questions exist regarding whether granting the application would be in the public interest. Read together with subsection (k), this means that a petitioner must demonstrate that substantial and material questions exist regarding whether the licensee has either committed a serious violation of the Act or rules and regulations or that a "pattern of abuse" of lesser violations have occurred. GGPR has not met this test and, therefore, as a matter of law, SFUSD is entitled to renewal of its broadcast license.